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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RIVERWATCH, et al.,

Plaintiffs and Appellants,

v.

COUNTY OF SAN DIEGO DEPARTMENT
OF ENVIRONMENTAL HEALTH, et al.,

Defendants and Respondents

GREGORY CANYON LTD.,

Real Party in Interest and Respondent.

D054471

(Super. Ct. No. GIN038227)

APPEAL from postjudgment orders of the Superior Court of San Diego County,
Robert P. Dahlquist, Judge. Affirmed.

A flood of litigation has followed the 1994 voter approval of Proposition C, an initiative allowing for construction and operation of a privately owned solid waste facility in North San Diego County (Gregory Canyon landfill, GCL or the project). (San Diego

County Sample Ballot and Voter Information Pamphlet, Gen. Elec. (Nov. 8, 1994) (Proposition C).) The current appeal deals with postjudgment orders denying in part and ultimately granting motions by Respondents (defendants County of San Diego Department of Environmental Health and Gary Erbeck, Director of the County of San Diego Solid Waste Local Enforcement Agency (collectively Respondents or the Agency)), to dissolve a peremptory writ. That peremptory writ was granted in 2006, following a dispositive October 2005 order ("October 2005 minute order," by Judge Michael M. Anello), which resolved numerous challenges to the environmental studies of the project, brought by plaintiffs and respondents (RiverWatch (no longer a party);¹ the Pala Band and the City of Oceanside).

The October 2005 minute order, judgment and writ of mandate, in effect, granted in part plaintiffs' claims that the Agency's approvals of various aspects of the landfill project were in violation of certain portions of the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.; CEQA),² as well as Proposition C. The Agency undertook to revise the final environmental impact report ("FEIR"), in pertinent part, and it ultimately certified a revised FEIR ("RFEIR") in May 2007, and created an addendum to it in July 2008 ("Addendum"), pursuant to the court's directions. Ultimately, the

¹ RiverWatch voluntarily dismissed its appeal, and the only remaining plaintiffs and appellants are the Pala Band of Mission Indians (Pala Band), and the City of Oceanside (Oceanside) (sometimes referred to as plaintiffs). The real party in interest and respondent GCL (the project proponent), is represented on appeal by counsel for the Agency.

² All further statutory references are to the Public Resource Code unless noted.

Agency brought these two motions to dissolve the writ, and that relief was granted in November 2008.

In this appeal, Pala Band and Oceanside (plaintiffs) challenge the trial court's conclusions in its postjudgment orders on two major topics involving water usage, including the adequacy of the RFEIR on groundwater analysis. They also challenge the adequacy of the Addendum to the RFEIR on water supply issues, including the impact of a March 2006 recycled water purchase agreement for supplying the project, entered into with the Olivenhain Municipal Water District ("OMWD").³ In general, plaintiffs argue the Agency abused its discretion under the definitions of section 21168.5, by not proceeding in a manner required by law, or by reaching a decision that was not supported by substantial evidence.

Further, on the biological mitigation measures analysis in the RFEIR, plaintiffs contend the trial court erred in ruling that the requirements of Proposition C were not violated, with respect to the acreage to be devoted to several biological mitigation measures, regarding vegetation, habitat for the Southwestern arroyo toad, and cumulative

³ The recycled water purchase agreement with OMWD was the subject of a recent published opinion by this court that set aside the agreement, for lack of adequate consultation by OMWD as a CEQA responsible agency. (*RiverWatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1195 (*RiverWatch*).) That matter is still in litigation upon remand, as we will further discuss in part IIB, *post*.

impacts of the project. They also contend the RFEIR does not adequately explain the changes made from the FEIR on those items.⁴

Our review of the record leads us to reach the same conclusions as did the trial court in granting the motions to dissolve the writ, that the Agency did not abuse its discretion under the standards of section 21168.5, in preparing the RFEIR (and the Addendum). In its ruling, the trial court correctly observed that its role was limited in certain crucial respects: "The Court is not responsible for determining whether the Gregory Canyon Landfill Project is a good project. The Court does not decide if the overall benefits of the project are worth the environmental costs and risks of the project. The Court does not decide if the project represents a wise and prudent use of the public's scarce resources. All of these significant decisions are left to the County's elected officials. [¶] Based on the current record, the Court is satisfied that the agency has complied with its obligations under CEQA. Such compliance should enable the elected officials to fulfill their important decision-making responsibilities." (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 573-574 (*Western States*).)

Therefore, we will affirm the postjudgment orders dissolving the writ.

⁴ This appeal focuses on issues surrounding the analyses of groundwater, water supply impacts, and biological mitigation measures. Although plaintiffs also originally objected to some of the trial court's conclusions on traffic at the project, they do not pursue those traffic issues on appeal. As an aside, we note that although the notice of appeal only designates the second order on the motions, the parties do not contest that both the February 2008 and the November 2008 postjudgment orders have been properly brought before this court for review.

FACTUAL AND PROCEDURAL BACKGROUND

As outlined in our prior nonpublished opinion, which addressed other final portions of the October 2005 minute order, this case has an extensive history. (*RiverWatch v. County of San Diego Department of Environmental Health* (June 12, 2009, D048259) [nonpub. opn.])⁵ We adapt that statement of its history in pertinent part for this brief outline of the facts, to be expanded in the discussion portion of this opinion. In 1994, Proposition C amended the San Diego County general plan and zoning ordinance, to designate this project site for use as a landfill and recycling center. Proposition C included certain language preserving at least 1,313 acres of open space in the area surrounding the landfill.

Pursuant to the passage of Proposition C, the project proponents sought various land use approvals from the Agency, which certified the original FEIR in February 2003. The Agency also issued the solid waste facilities permit approving the landfill project in June 2004. It was anticipated that the landfill will operate for 30 years, utilizing

⁵ In D048259, our prior nonpublished opinion, the issues resolved were those in which the October 2005 minute order had ruled against plaintiffs. Plaintiffs unsuccessfully appealed those rulings, including the FEIR's treatment of (1) private vehicle traffic at the landfill, (2) the design and phased construction of the storm water control system, (3) long term threats to groundwater quality, from, e.g., the liner design, (4) funding for mitigation of cumulative biological impacts, (5) use of sound walls to mitigate noise impacts, and (6) mitigation measures relating to an historic cemetery. In the current appeal, by contrast, we are dealing with the issues on which the plaintiffs were initially successful in 2005, so that revisions to the environmental documents were carried out by the Agency, in its efforts to comply with the directions of the October 2005 minute order. Accordingly, our previous opinion does not directly resolve any of the current challenges to the RFEIR issues, although we will refer to it for related points and discussion.

approximately 193 acre feet per year of water (AFY) when both construction and operations are taking place. Operation only of the landfill will use less (38 AFY per year.) After the planned 30 years of operation, postclosure water needs should be minimal.

In July 2004, this action was brought, and the initial litigation of it resulted in the October 2005 minute order that identified several deficiencies in the FEIR. Specifically, the trial court (Judge Anello) determined that the FEIR incorrectly relied, without adequate explanation, on unspecified appropriative and riparian rights, in its conclusion there was sufficient water available to the project. The FEIR had also impermissibly included biological mitigation measures that were not in compliance with the language of Proposition C, regarding the manner in which open space was to be used and recharacterized. Judgment was issued to require further studies only on the areas identified.

In response to the October 2005 minute order and writ/judgment, the Agency conducted further studies and negotiations, and in the May 2007 RFEIR, set forth its water supply agreement reached with OMWD in March 2006. Also, the project description was revised to improve the liner design for the landfill, and to explain the contracted-for use of recycled water and recycled water facilities at the project, as well as a groundwater treatment facility for use in the event that groundwater impacts were identified. The groundwater analysis continued the descriptions used in the FEIR of seven existing wells used for monitoring groundwater, and described them as the second source of water for the facility, to be used in construction and operation of the project, up

to safe yield levels, as calculated by a consultant, Geologic Associates (GLA).⁶

However, regarding the groundwater usage, the consultant and Agency found that no significant impacts would result from such use of groundwater from the bedrock wells, so no mitigation in that respect was required. (See part III, *post.*)

The RFEIR also revised the biological mitigation measures regarding habitat creation and enhancement, with attention to Proposition C language about the allowable uses of its designated open space acreage. (See part V, *post.*)

In its February 11, 2008 motion to dissolve the writ, the Agency contended it had made adequate revisions to satisfy the court's October 2005 minute order. It provided judicial notice of the previous order and judgment entered, and argued that the RFEIR met all of the concerns identified.

At the same February 2008 hearing, the trial court (now Judge Dahlquist) was presented with a motion by plaintiffs, in opposition, to have the court consider, or augment the administrative record, with a separate 2006-2007 "Water Quality Monitoring Report," prepared by the same consultant that had prepared a "Water Supply Report," attached as appendix C to the RFEIR. That Water Quality Monitoring Report included data gathered after January 2006, showing that some levels of constituents of concern

⁶ Landfills are subject to groundwater monitoring requirements, such as the system established under California Code of Regulations, title 27, sections 20405 et seq., 20415, subdivision (b)(1), for groundwater monitoring for contaminants. The FEIR included a 2003-2005 groundwater quality monitoring plan, continued in the RFEIR.

(COCs) were being found in certain of the existing monitoring wells at the undeveloped site.⁷

After considering the opposition and reply and holding a hearing, the trial court denied the motion to allow additional evidence or augment the administrative record, because plaintiffs had not shown any reasonable diligence in not producing the information earlier. That report was not part of the administrative record, and the court ruled that it should consider only the materials before the Agency when it reached its May 2007 decision to certify the RFEIR.⁸

The trial court then accepted the Agency's analyses on the water supply issues in some respects but not others. First, the court ruled that the RFEIR adequately disclosed the two proposed sources of water for the project, as purchased OMWD recycled water and on-site percolating groundwater. The RFEIR states that the principal source of water would be recycled water purchased from OMWD, under the 2006 contract to provide the project with up to 230 AFY of water, for a term of 60 years. This was deemed to be an adequate explanation of the existence of the anticipated water supply for the project, according to the principles set forth in *Vineyard Area Citizens for Responsible Growth v.*

⁷ The principal dispute is over the report containing post-January 2006 data from sampling of monitoring wells for any measurable levels of methylene chloride, a pollutant (solvent or refrigerant) found in some of the monitoring wells at the undeveloped site.

⁸ At the February 2008 hearing, the court also denied plaintiffs' request to add to the record a 2005 urban water management plan and a comprehensive master plan prepared by OMWD. Those documents were later included as part of the administrative record in the supplemental record prepared for the Addendum.

City of Rancho Cordova (2007) 40 Cal.4th 412, 426-428 (*Vineyard*). However, the court next found that the RFEIR did not adequately address the environmental effects, if any, of using that proposed water supply. "Therefore, the Court believes that the writ should not be discharged unless and until these deficiencies are cured." (Accordingly, the water supply agreement issues became the subject of the next hearing, held November 20, 2008.)

However, with respect to the adequacy of the RFEIR on the usage of groundwater for monitoring and supply, the court ruled in favor of the Agency, noting in part that some of the contamination issues were based on plaintiffs' objections to the type of liners to be used in the landfill, based on contamination concerns. Those issues had already been ruled upon in the October 2005 proceedings, and plaintiffs had not raised new or meritorious objections to the monitoring programs, nor could the newly provided evidence be properly considered. Also, plaintiffs did not succeed in showing that the Agency's analysis was inadequate, through its alleged use of "inflated and internally inconsistent rainfall values to artificially increase the 'safe yield' of the bedrock aquifer."

Next, the court considered plaintiffs' additional theories in opposition to the motion, with regard to the RFEIR's allegedly inadequate analysis and identification of concerns about the biological mitigation measures and whether they complied with the open space requirements of Proposition C. The Agency was proposing certain specific programs for creation and enhancement of habitat both on and off-site of the project. The trial court ruled that those mitigation measures did not impermissibly duplicate each other nor violate Proposition C provisions. (See part V, *post.*)

Accordingly, the remaining issue on the impact of the water supply agreement was sent back to the Agency. In July 2008, the Agency prepared an Addendum to the existing RFEIR, to study the impact of the contractual recycled water supply upon other current OMWD customers (to be described in part IV, *post*). The Agency then brought its second motion to dissolve the peremptory writ, which was opposed. The court heard argument and granted the second motion in November 2008. This had the effect of dissolving the writ issued in connection with the 2006 judgment.

Plaintiffs appealed the November 2008 postjudgment order (and, in effect, the February 2008 order as well; see fn. 4, *ante*).

DISCUSSION

We first set forth rules for appellate review, and then comment upon the status of the proceedings and the proper extent of this record of these studies and transactions. We then address the groundwater quality and water supply issues raised concerning the RFEIR and the Addendum. (Pts. III, IV, *post*.) Finally, we turn to the RFEIR's treatment of the biological mitigation measures, as related to Proposition C terminology. (Pt. V, *post*.)

I

RULES OF REVIEW

Here, as in our prior unpublished opinion, our focus is upon whether the Agency violated CEQA in certifying the RFEIR and preparing the Addendum, either through a lack of substantial evidence to support its determinations or decisions, or through a failure to follow the procedures required by law. (§ 21168.5; *Laurel Heights*

Improvement Assn. of San Francisco v. The Regents of the University of California (1993) 6 Cal.4th 1112, 1123 (*Laurel Heights II*); see Cal. Code Regs., tit. 14, § 15003, subd. (a) (CEQA Guidelines).)⁹ The purpose of an EIR " 'is to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made. Thus, the EIR "protects not only the environment but also informed self-government." ' " (*Laurel Heights II, supra*, 6 Cal.4th at p. 1123.) "CEQA requires an EIR to reflect a good faith effort at full disclosure[, but] does not mandate perfection, nor does it require an analysis to be exhaustive." (*Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 26, citing CEQA Guidelines, § 15151.)

CEQA Guidelines set forth the definition of "substantial evidence" in the CEQA context as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (CEQA Guidelines, § 15384, subd. (a); *Laurel Heights II, supra*, 6 Cal.4th at p. 1133.) In applying the substantial evidence standard, the reviewing court " 'must resolve reasonable doubts in favor of the administrative finding and decision.' " (*Laurel Heights Improvement Assn. of San Francisco, Inc. v. The Regents of the University of California* (1988) 47 Cal.3d 376, 393 (*Laurel Heights I*).) " 'The court does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document.' " (*Id.* at p. 392; § 21080.)

⁹ The CEQA Guidelines are promulgated by the State Resources Agency and "are accorded great weight by the court in interpreting the provisions of CEQA." (*League for Protection of Oakland's etc. Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 899, fn. 1.)

It is particularly relevant here to observe that a court ruling upon a challenge to an EIR will not resolve conflicting expert opinions, as part of a substantial evidence analysis. " 'The fact that there are differing opinions arising from the same pool of information is not grounds for holding the EIR inadequate. . . . [¶] . . . 'It is not required 'that the body acting on an EIR correctly solve a dispute among experts.' All that is required is that in substance the material in the EIR be responsive to the opposition, particularly where opinion and not fact is in issue. [Citation.]" ' [Citation.] 'A court's task is not to weigh conflicting evidence and determine who has the better argument We have neither the resources nor scientific expertise to engage in such analysis, even if the statutorily prescribed standard of review permitted us to do so.' " (*Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th 74, 101-102 (*Cadiz*), quoting *Laurel Heights I, supra*, 47 Cal.3d at p. 393.)

On the alternative procedural grounds argued by plaintiffs, our role " 'is the same as that of the trial court: that is, to review the agency's actions to determine whether the agency complied with procedures required by law.' " (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1375.) We independently review the administrative record under the same standards that govern the trial court. (*Id.* at pp. 1375-1376.) This amounts to de novo review of the procedural correctness of the actions taken. However, it is well established that courts generally may not consider "extra-record evidence" to show that an agency " 'has not proceeded in a manner required by law' " in making a challenged decision. (*Western States, supra*, 9 Cal.4th 559, 565.)

II

STATUS OF RECORD AND RELATED PROCEEDINGS

Before turning to the record to assess whether substantial evidence supports the determinations of the Agency in approving the project, and whether it followed the appropriate procedures, we address several preliminary procedural issues.

A. Denial of Motion to Admit Extra-Record Evidence

In the February 11, 2008 order, the trial court denied plaintiffs' motion to admit into evidence, or to supplement the administrative record, with the GLA 2006-2007 Water Quality Monitoring Report. Plaintiffs argued that this report was available prior to the May 2007 certification of the RFEIR, but the Agency failed to address the data in the report, and this may have constituted Agency misconduct. Plaintiffs contend this omission amounted to a failure of the Agency to proceed in the manner required by law, regarding a complete groundwater analysis. They argue they exercised reasonable diligence in discovering the document (about six months after the RFEIR was certified, when the opposing papers were filed to the first motion). The Agency disagreed, stating that the normal procedures for review of the RFEIR contents had been followed for all of the public, including plaintiffs, so that any serious omission could have been discovered earlier.

Plaintiffs also suggest that the trial court and this court, on de novo review, should consider the additional 2006-2007 data found in the Water Quality Monitoring Report that was not allowed into evidence, to find that the RFEIR is incomplete.

Normally, " 'when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered.' " (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3 (*Vons Companies, Inc.*)) If exceptional circumstances exist to justify deviating from those usual rules of review, evidence of events postdating the rulings can be considered. (*Ibid.*; *Western States, supra*, 9 Cal.4th 559, 578; *RiverWatch, supra*, 170 Cal.App.4th at pp. 1218-1219.)

In the CEQA context, courts do not allow extra-record evidence to be admitted where it amounts to an attempt "to introduce conflicting expert testimony to question the wisdom and scientific accuracy" of the agency's decision. (*Western States, supra*, 9 Cal.4th 559, 578.) However, "evidence that could not be produced at the administrative level 'in the exercise of reasonable diligence' " may be admitted in court proceedings. (*Ibid.*) Such a trial court ruling should be subject to appellate review under an abuse of discretion standard. (See *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.)

It is not disputed that there is other evidence in the RFEIR about ongoing water quality monitoring at the project site, and plans were laid out in the original FEIR for such groundwater water quality monitoring protocols. The RFEIR has a similar report attached as its appendix C, a Water Supply Report by GLA (the same consultant), dated the same time frame (2006-2007), covering some of the same groundwater quality issues. For example, the appendix C Water Supply Report contains a discussion of the available percolating bedrock water supply, and the potential impacts associated with use of percolating groundwater. It also includes tables with information about methylene

chloride compounds found in groundwater samples collected at three of the seven monitoring wells at levels of significance, in January 2006. Not all of these monitoring wells were to be used for supply. However, the RFEIR text did not separately discuss all the table information provided in the text of its appendix C report.

Plaintiffs further contend the Agency did not proceed in the manner required by law, regarding the inclusion in the RFEIR of a one-page memorandum by a GLA consultant, describing the known practice of using monitoring wells also for supply; the memo was attached as the last page of appendix C (Water Supply Report), but it was not individually discussed in the RFEIR. There is other discussion in the RFEIR of the use of supply wells for monitoring purposes. (See *Vineyard, supra*, 40 Cal.4th at p. 442 [relevant information should not be hidden within an EIR].)

The Agency argued to the trial court that even if the Water Quality Monitoring Report were to be considered, it does not contain materially different information about contamination possibilities or history at the site. The proposed material states that in 2007, the groundwater quality conditions at the site were generally similar to those observed in previous years. It also states that since the site is undeveloped, it was possible that the low level organic compound levels found in several of the monitoring wells could have been the result of field and/or laboratory contamination, or possibly agricultural activities in the area. The report did not show that any of the monitoring wells demonstrated an increasing level of contaminants (including methylene chloride).

We consider the denial of this motion for admission of extra-record evidence under an abuse of discretion standard. Normally, the trial court reviews the whole record

that was before the administrative agency when it made the rulings under attack. (CEQA Guidelines, § 15384.) There may be legitimate reasons why some material was not included in the RFEIR, so that, as stated by the trial court, "the mere fact that the report is not in the record does not establish agency misconduct." Also, plaintiffs did not offer to the trial court any details concerning their diligence in obtaining the material outside the record. Overall, plaintiffs have not shown how the trial court prejudicially abused its discretion or otherwise erred in determining that the voluminous record would not be augmented with the 2006-2007 Water Quality Monitoring Report, nor admitted at the hearing. (*Vons Companies, Inc., supra*, 14 Cal.4th 434, 444.)

B. Related Proceedings

Next, as already indicated, this court's published opinion in *RiverWatch, supra*, 170 Cal.App.4th 1186, in January 2009 reversed an order in a related case that had denied a challenge by RiverWatch to the adequacy of the 2006 OMWD agreement on CEQA grounds, and that matter is still pending in the trial court. In that matter, we concluded "OMWD's approval and signing of the Agreement constituted approval of part of the Landfill project within the meaning of CEQA and its guidelines." (*Id.* at p. 1212.) However, OMWD had not participated in the CEQA process, and thus had violated its CEQA duties as a responsible Agency. Therefore, the Agreement had to be set aside, because of OMWD's failure to consider the FEIR prepared by the lead agency (i.e., DEH), or to reach independent conclusions on whether to approve the project involved. (*Id.* at p. 1215.)

At the time the trial court made these November 2008 postjudgment orders, the March 2006 OMWD water supply agreement was still in force. The Agency had made decisions in preparing the RFEIR and the Addendum in light of that existing agreement. The status of the newly required CEQA review and any renegotiation of the OMWD agreement, following our prior published opinion of January 2009, is not included in this record.

We also note that the existing record contains some letters between counsel for the various parties, evidencing that around October 2008 there were several disputes about the binding effect of the OMWD agreement, at a time when the project proponent was also seeking alternative water sources, and OMWD complained about those actions as potential breaches of contract. At the November 2008 hearing, the March 2006 agreement remained in effect. In any case, the procedural rules for CEQA review make it important for this court to focus on the issues presented in light of the record as it existed at the time the postjudgment orders were entered. (See *Vons Companies, Inc.*, *supra*, 14 Cal.4th 434, 444.)

As observed in our prior unpublished opinion, the status of the OMWD agreement is "at most, indirectly relevant" to the specific questions remaining about the adequacy of the FEIR's groundwater analysis and related issues. *RiverWatch*, *supra*, 170 Cal.App.4th at pages 1218 to 1219 treated the OMWD contract issues separately from any groundwater analysis. At oral argument, the parties addressed the status of the OMWD water supply agreement, insofar as it affects the issues raised about the Addendum and the RFEIR. Although we were then informed that the OMWD contract has been

withdrawn, the rules of review require that we address the legal issues presented, as they are framed by the existing record.

III

GROUNDWATER ANALYSIS IN RFEIR

A. Rulings and Issues Presented

To refresh the reader's recollection, in the October 2005 minute order, the 2003 FEIR was found insufficient regarding water supply, in its reliance upon overly generalized or assumed riparian or appropriative rights. After restudy, the May 2007 RFEIR states that one of the two proposed sources of water for the project is on-site percolating groundwater from bedrock wells. This groundwater is subject to a monitoring and sampling program established by the FEIR and continued in the RFEIR. (Please see pt. IV, *post*, for discussion of the other main source of supply of water for the project, purchased recycled water, that was to be provided through the OMWD agreement, as studied in the Addendum.)

In our prior unpublished opinion (filed June 2009), discussing the related FEIR liner issues, we noted: "Contrary to plaintiffs' claim, the FEIR provides an extensive analysis of the potential degradation of groundwater quality. It states that groundwater monitoring would continue for a minimum of 30 years after the proposed landfill was closed, as required by title 27 of the California Code of Regulations. The conclusions set forth in the FEIR are based on studies by numerous experts, including hydrogeologic investigations of the proposed site as well as studies of other lined landfills." We also took note that "Class III landfills have been prohibited from accepting known hazardous

wastes. This requirement has greatly reduced the inflow of hazardous chemicals into the municipal solid waste stream, and the results are evident in the leachate chemistry obtained from such sites. *Regardless of the performance of other local landfills, the proposed Gregory Canyon Landfill would be evaluated and regulated based on the actual groundwater quality and leachate chemistry data collected from this site.*"

At the February 11, 2008 hearing leading to the order on the motion to dissolve the writ, plaintiffs unsuccessfully argued that, with respect to the designated use of groundwater from monitoring wells, the RFEIR remained inadequate on two major grounds, which we will discuss in turn. We first address their argument, renewed on appeal, that "the RFEIR failed to properly analyze the impact of using contaminated groundwater."

We will then turn to plaintiffs' additional argument, as summarized by the trial court, that "the analysis of the impacts of using on-site percolating groundwater to supply the 'operational needs' of the project was flawed because it used inflated and internally inconsistent rainfall values to artificially increase the 'safe yield' of the bedrock aquifer from which the water would be pumped and used inflated 'recharge area' numbers."¹⁰

¹⁰ At the February 11, 2008 hearing, plaintiffs were also contending the RFEIR was deficient, for failure to identify and analyze the need for OMWD to obtain approvals before it could sell recycled water blended with potable water outside its service area. The trial court found no such defect. Plaintiffs again pursued that "approvals" issue with reference to the Addendum, and it was again rejected, and does not appear to be further argued here. (Pt. IV, *post.*)

B. Contentions on Groundwater, Use of Wells, Impacts on Groundwater Quality

1. Introduction

Plaintiffs argue that as to any potential use of groundwater that might be contaminated, the Agency violated both of the CEQA standards found in section 21168.5: (1) inadequate procedural compliance with the requirements of law; and (2) lack of substantial evidence to support the Agency's determinations or decisions. At the outset, we clarify that we will not revisit plaintiffs' arguments about the exclusion from evidence of the 2006-2007 Water Quality Monitoring Report, prepared by GLA but not included in the RFEIR. We already concluded in part IIA, *ante*, that there was no abuse of discretion in the trial court's ruling that it need not consider material that was not before the Agency when it made its decision to issue the approvals for the project. (See *Western States, supra*, 9 Cal.4th 559, 565 [extra-record evidence is generally not admissible to show that an agency "has not proceeded in a manner required by law" in making a CEQA decision].)

2. Changes in Design

Also at the outset, we reject plaintiffs' argument that the use of the monitoring wells for supply amounted to a drastic or radical change in project design. The Agency had prepared the RFEIR in response to the October 2005 minute order, which required specification of the sources of water for the project. In that order, the court noted that although the original FEIR discussed the presence of bedrock wells on the landfill site, which could produce adequate water for the operational needs of the project, it failed to make any meaningful distinctions between the aquifers that would supply the wells, or

the available riparian water sources, or any of the water sources that would require permits to be obtained for pumping. More information was needed to identify the source of water and to analyze the impacts of obtaining water, and the RFEIR was prepared accordingly. (CEQA Guidelines, § 15065, subd. (a) [definition of significant effect on the environment].)

However, the October 2005 minute order also determined that the FEIR was adequate as to water quality analysis with respect to drainage systems, the effectiveness of the liner system, and potentials for groundwater contamination. The FEIR contained designs and specifications for the monitoring wells, and enough information to identify which wells would potentially be used for water supply. Nevertheless, the RFEIR updated the project description to include an improved liner system for the site, and a groundwater treatment facility.

Plaintiffs' remaining contention on this point is mainly an argument that the use of the monitoring wells for the additional purpose of water supply may deplete the wells in such a way that the original sampling schedule for monitoring water quality should be updated. They claim the existing groundwater contamination analysis was provided only in tables in the RFEIR, and was not adequately discussed in the RFEIR text, concerning the "constituents of concern" identified in the federal regulations. As currently summarized by the trial court: "They argue that, given this sampling infrequency, the RFEIR should have discussed the impacts that could result if the liner leaks and contaminated groundwater is used at the site."

To the extent this groundwater contaminant argument refers to potential leakage in the landfill liner, the trial court correctly observed that the October 2005 minute order previously rejected such a challenge to the FEIR based on water quality issues. Also, the court made a reasonable observation that plaintiffs had failed to adequately explain how taking samples of constituents of concern from groundwater production wells would likely impact water quality, such that further analysis in the RFEIR was required. The Agency generally accepted the proposition that the use of monitoring wells for supply was justified by the data and adequately disclosed in the studies, and this was not shown to be an abuse of discretion.

Accordingly, we reject plaintiffs' contention that the trial court in the current proceedings erred by treating this groundwater challenge as too closely related to the liner leak issue that had already been resolved. Rather, it is obvious from the record that the trial court understood there were several factually distinct arguments about groundwater, and addressed them all in its scholarly 20-page order.¹¹

3. Water Quality Issues

The RFEIR included information from GLA studies that showed that the groundwater wells have the capacity to produce a safe yield of approximately 43.5 AFY, which would supply most, if not all, of the operational water needs of the project (38 AFY, although more is needed if construction is going on, as it often will be). The

¹¹ Elsewhere in the February 2008 order, in the context of the biological mitigation measures, the court referred to an earlier finding in the October 2005 minute order on the analysis of the impacts of groundwater pumping in the FEIR (deeming it sufficient). The court stated that such a claim should not be relitigated at this point.

pumping stations at the wells are designed to monitor the amount of water extracted from the bedrock, so that it may be kept within controlled levels. When construction is going on, more water is required, and the 193 AFY contract figure was estimated to supply the project needs.

Moreover, at the hearing on the first motion to dissolve the writ, counsel for the Agency pointed out that plaintiffs' arguments about possible contamination did not acknowledge that not all of the monitoring wells would be used for supply of groundwater. A protocol for monitoring the groundwater was in place in the original FEIR and the RFEIR. Thus, the Agency had available to it raw data of the existence of such contaminants at measurable levels in some of the monitoring wells, but it did not evaluate those levels as being of major concern because they were not to be used as supply wells. Also, the appendix C Water Supply Report did not show that any of the monitoring wells demonstrated an unacceptable level of organic compounds or contaminants.

Further, the one-page memorandum by a GLA consultant about the known practice of using monitoring wells also for supply was attached to Appendix C of the RFEIR, and provided some information to the decision makers for evaluating the dual use of the monitoring wells. That memo was prepared in March 2007, around the same time as the Water Supply and Water Quality Monitoring Reports were prepared by GLA, and when the RFEIR was completed (certified in May of 2007). Arguably, time pressure might have had something to do with the lack of discussion of the one-page memorandum in the text of the RFEIR, and in any case, plaintiffs' arguments about it are

essentially a selective choice of evidence to place it out of context. (See *Western States, supra*, 9 Cal.4th at p. 565.)

For these reasons, plaintiffs have not pointed out how the project description was drastically or radically changed when the court ordered designation of water supply was carried out, to include greater use of monitoring wells, also for supply. The project description did not give rise to a need for further environmental analysis.

4. Effect of 2006 Water Supply Agreement

In any case, the OMWD water supply agreement was anticipated to supply adequate water for operation and construction of the project, so extensive usage of groundwater from the wells was not a major part of the plan. This alternative source of water is described in the RFEIR (the OMWD contract to provide recycled water to the project for more than the 30-year operational life of the landfill). The project will not rely solely or chiefly on groundwater sources, and plaintiffs did not show the analysis was inadequate as to potential contamination of the groundwater that was likely to be utilized.

As previously explained, courts are not required to resolve conflicts between expert opinions in challenges under CEQA. (*Laurel Heights I, supra*, 47 Cal.3d at p. 393; *Cadiz, supra*, 83 Cal.App.4th at pp. 101-102.) Instead, we have only to decide whether the FEIR "address[ed] the impacts of 'reasonably foreseeable' future activities related to the proposed project." (*Vineyard, supra*, 40 Cal.4th at p. 428.) The record supports the conclusion that it did so on the groundwater monitoring and supply issues.

C. Groundwater Safe Yield Analysis: Rainfall Data

Plaintiffs contend that the Agency used inexplicably conflicting numbers in the RFEIR, for the yearly amounts of rainfall that affect the project drainage area, but failed to adequately explain that conflict. They accordingly argue that the RFEIR conclusion that the bedrock wells on the site can supply the operational needs of the project is not supported by substantial evidence in the record.

In its order, the court first acknowledged that the RFEIR includes GLA's "safe yield" calculation, for determining a reasonable level of pumping that could be performed on the project site that would not exceed the amount of groundwater flowing into the bedrock on the project site. In calculating the "safe yield," GLA used an average rainfall figure of 25 inches per year at the site. The RFEIR states that the assumed rainfall of 25 inches was based on rainfall data from the Lake Henshaw station.

The order further notes that the RFEIR includes several different rainfall levels in the immediate area, because there is no measuring station at the site. The court compared the different measuring station results (at Lake Henshaw, Fallbrook, and Escondido) and determined that the Agency had a sufficient basis to conclude that the Lake Henshaw data, taken over the past 42 years, was the most useful for purposes of evaluating groundwater production over an extended period. In its order, the court acknowledged there was also available 1991 data from 116 rainfall stations throughout the county (from a County Department of Public Works map) that showed the site was estimated to have an average of around 15-18 inches for that part of the county.

After discussing the mechanics of the recharge area for groundwater at the project, through rainfall and related input (including the effect of the project footprint), the court explained its conclusions by stating: "For the project water supply, a totalizer meter will be installed to evaluate the combined groundwater extracted from the bedrock wells so that the calculated safe yield is not exceeded. Since the safe yield calculation is based on average rainfall value over time, the amount of water pumped should represent the average safe yield. Each water supply well will be equipped with dedicated pumping equipment and level controls that will cycle the pump on and off so that only water present within the controlled levels within the producing bedrock zone is extracted (i.e., if there is less infiltration, less water will be available for pumping). In this way, the pumping system will accommodate the site conditions over time."

Plaintiffs argue the trial court nevertheless failed to recognize that the entire groundwater analysis was flawed, as to the anticipated input or recharge from rainfall. Plaintiffs point out that in the related stormwater control design discussion, a median rainfall figure of 14.1 inches per year over 30 years was used, and those experts acknowledged that any estimates that placed yearly rainfall at around 29 inches were too high. Previously, when the FEIR studied groundwater for purposes of estimating leachate, it used a yearly rainfall average of 14.59 inches per year, and elsewhere used an 18 inch per year estimate from a 50-year period in which rainfall ranged from 4.4 inches per year to 24.79 inches per year. In the original FEIR, in a mitigation analysis for the Southwestern arroyo toad, a rainfall estimate of 10 inches per year was used. This was found in a 2002 biological impact report, saying that silt ponds would not be a likely

refuge for predators of the arroyo toad, because this is a desert-like area. (However, that figure is not backed up in that 2002 document, which was not a water-related report, so it is of doubtful relevance.)

From all these figures, plaintiffs contend there are internal inconsistencies in the RFEIR on rainfall estimates, so as to indicate that the safe yield for groundwater estimates may need to be recalculated. Plaintiffs' main suggestion seems to be that the Agency was selectively picking and choosing rainfall for different purposes in the RFEIR. This argument does not fully acknowledge the trial court's reasoning that "precipitation data used for the project can be extrapolated from any of these locations, taking into account a range of criteria, as appropriate to the intent of the data."

Further, "[a] court's task is not to weigh conflicting evidence and determine who has the better argument We have neither the resources nor scientific expertise to engage in such analysis, even if the statutorily prescribed standard of review permitted us to do so." (*Laurel Heights I, supra*, 47 Cal.3d at p. 393.) Even assuming that a different analysis could also have been appropriate, once the various rainfall figures have been evaluated in context, they are not as drastically different as plaintiffs represent. There is nothing shown to be improper about the safe yield approach taken by the Agency.

The trial court had a sufficient basis in the record to conclude that the RFEIR should not be invalidated on the basis of the different rainfall numbers available and utilized for the safe yield analysis.

IV

ADDENDUM ARGUMENTS

A. Background; Rulings; Preparation of Addendum

On May 30, 2007, the RFEIR was certified as complete, identifying as a source of water the March 2006 OMWD contract, providing for a maximum of 230 AFY to be supplied for a 60-year period. The planned landfill is to operate for 30 years, actually utilizing approximately 193 AFY when both construction and operations are both taking place. Operation only of the landfill will use less (38 AFY). After the planned 30 years of operation, postclosure water needs will be minimal.

At the February 11, 2008 hearing leading to the order on the motion to dissolve the writ, plaintiffs successfully argued in pertinent part that, with respect to such use of recycled water, the RFEIR was inadequate because "it fails to identify and analyze the baseline amount of water available from OMWD and the impacts to OMWD's customers from the sale of the water for 60 years." The court agreed, and the RFEIR was found inadequate regarding its failure to adequately address the environmental effects, if any, of using that proposed water supply. However, the Agency's previous certification of the RFEIR was not set aside. Instead, the Agency prepared the July 2008 Addendum, analyzing the identified issues.

In opposition to the Agency's second motion to dissolve the writ, plaintiffs argued that the Addendum was inadequate on several grounds. The trial court summarized those arguments in its November 20, 2008 order, as follows:

"[Plaintiffs] oppose the Respondents' motion on the following grounds: (a) Respondents violated CEQA by preparing an addendum to the EIR rather than a supplemental EIR; (b) the addendum failed to evaluate the impacts of supplying the entire amount of recycled water required under the agreement with OMWD; (c) the addendum addressed only the impacts on current OMWD recycled-water users; (d) the addendum failed to discuss the impacts of supplementing recycled water with potentially potable water."¹²

All four arguments were rejected by the trial court, and plaintiffs reiterate them on appeal. Generally, plaintiffs contend there was (1) inadequate procedural compliance with the requirements of law; and/or (2) lack of substantial evidence to support the Agency's determinations. (§ 21168.5.)¹³

B. Use of Addendum Procedure

In the February 11 order, the trial court gave this explanation of the further analysis to be performed about the potential impacts of the OMWD contract on existing customers. "The RFEIR need not provide a perfect accounting of the current and anticipated future uses of OMWD recycled water, but it needs to provide enough information to enable decision makers to evaluate the pros and cons of the project.

[*Vineyard, supra*, 40 Cal.4th at p. 431.]"

¹² In a further argument, plaintiffs argued that the Addendum incorrectly failed to discuss the need for OMWD to find that it has surplus waters and to obtain approvals to sell imported water outside its boundaries. The trial court ruled that those issues had already been addressed in prior proceedings and need not be reevaluated at that time, and we agree.

¹³ In our prior published opinion in *Riverwatch, supra*, 170 Cal.App.4th 1186, we accepted those plaintiffs' argument that CEQA review was required before OMWD could properly enter into the water supply agreement for this project. That case is proceeding separately.

As summarized by the trial court, an addendum may be an appropriate CEQA document if " 'only minor technical changes or additions' " are presented. (*Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1124-1125.) In the comment to CEQA Guidelines section 15164, it is explained that an addendum is used to make minor corrections in an EIR, without the need for recirculation of it. Under section 21166, a subsequent or supplemental EIR shall not be required by the Agency, unless: "(a) Substantial changes are proposed in the project which will require major revisions of the [EIR]. [¶] (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the [EIR]. [¶] (c) New information, which was not known and could not have been known at the time the [EIR] was certified as complete, becomes available."

Plaintiffs initially argue the July 2008 Addendum was not in procedural compliance with those CEQA standards. They seem to be claiming that the Agency should not have certified the RFEIR in May 2007, because it knew that more challenges about changes in the project planning were still going on, and more defects were eventually identified at the February 2008 hearing. In that light, they argue that more public disclosure should have been made about the potential impact of the 2006 water supply agreement upon other OMWD customers.

Alternatively, plaintiffs argue that even if the May 2007 certification were still effective, the Agency should have done a supplemental or subsequent EIR and recirculated it, because "substantial changes" in the project design had been made,

regarding details of water supply.¹⁴ (CEQA Guidelines, § 15164, subd. (a) [addendum allowed where some changes or additions are necessary but none of the conditions described calling for preparation of a subsequent EIR have occurred].)

At the hearing on the second motion to dissolve the writ, counsel for the Agency responded to those arguments by saying that the statutory standards of section 21166 did not require any supplemental or subsequent EIR. The existence of the project's agreement with OMWD for water supply did not amount, under that statutory definition, to a substantial change in the project, or material revisions of it, or significant new information about it. In the Addendum, the Agency had, as required by CEQA Guidelines section 15164, subdivision (e), explained why no subsequent EIR was deemed to be necessary.

In the November 2008 order, the trial court confirmed that the certified RFEIR remained in existence at the time the Addendum was adopted, and it concluded that the Agency properly elected to proceed by using an addendum to it. The OMWD contract details were discussed as a water source in the RFEIR. Thus, the primary sources of water for the project did not remain uncertain, so as to mandate a supplemental EIR on the issues related to the source and availability of water to the project. The court concluded the Addendum to the RFEIR was correctly used to address the potential impacts of the primary planned source of water for the project (the contract with OMWD)

¹⁴ Under section 21092.1, when significant new information is added to an EIR after public notice and consultation have occurred, but prior to certification, the public agency shall give additional notice and allow additional consultation before certifying the EIR.

upon existing OMWD customers or existing uses of the recycled water. Such additional information, in the Addendum, did not change the project in any material respect nor reflect any significant impacts not discussed in the RFEIR.

We agree with the trial court that the additional information concerning the impacts upon others of OMWD's contract to supply water to the project amounted to a "minor correction" that could properly be addressed in an addendum to the RFEIR. Plaintiffs have not shown how the May 2007 certification was nullified by the various court rulings. Instead, the trial court's evaluation of the nature of the additional information required was reasonable under all the circumstances.

C. Adequacy of Addendum Analysis

1. Impacts on Other Users; Amounts to be Supplied

Pursuant to the February 2008 ruling, OMWD was required to provide in the Addendum the details of how it would have adequate recycled water available to serve the project without adversely affecting recycled water supplies for its current customers (i.e., baseline conditions pertaining to existing uses of recycled water).

Plaintiffs now contend the Addendum failed as an informational document, by not providing an adequate accounting of the current *and anticipated future uses* of OMWD recycled water. Plaintiffs seem to argue that the February 11 order should be read, under CEQA standards, as impliedly requiring the Agency to provide more information about the potential impacts of the OMWD contract not only on *existing* customers *or existing* uses of recycled water, but also on *future* customers and uses. They also argue the Addendum analysis is unclear with respect to the amounts of recycled water actually to

be provided by OMWD to the project (e.g., the contracted for amount of 230 AFY, or the projected 193 AFY?), and whether its supply will be adequate.

CEQA seeks "to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been taken into account." (*Vineyard, supra*, 40 Cal.4th at p. 449.) Plaintiffs contend the requirements set out by the Supreme Court in *Vineyard* at pages 439 to 440, for analyzing future demand for new water sources were not met (i.e., EIRs must address "the impacts of 'reasonably foreseeable' future activities related to the proposed project"; *id.* at p. 428, citing CEQA Guidelines, § 15144).

Under *Vineyard*, it is not enough to make assumptions without facts, nor to analyze only the first few years of a project's operation. (*Vineyard, supra*, 40 Cal. 4th at pp. 430-431.) Any future water supplies identified in an EIR must be "likely" to be available and not speculative; and if uncertainties remain, some discussion of possible replacement sources or alternatives to use of the anticipated water supply, such as curtailing development, must be included. (*Ibid.*)

The RFEIR and the Addendum addressed the capacity of OMWD's facilities. OMWD's production of 1,232 AFY in the relevant area in 2007 would exceed the 193 AFY of recycled water needed by the Project. OMWD has the ability to produce up to 2,200 AFY of recycled water. Normally, it can purchase from other agencies amounts of water needed to supplement its production. The Addendum also includes a discussion of

the uncertainties in overall water supply in the area, due to competition with other agencies and climatic conditions.

We think the Addendum met the standards in *Vineyard, supra*, 40 Cal.4th 412, because it addressed not only the potential impacts on current OMWD recycled water users of the supply of water to the project, as required by the orders, but it also included some meaningful analysis of future water uses. The Addendum includes discussion of the San Diego County Water Authority and OMWD "urban water management plans," discussing both normal dry year conditions, and multiple dry year scenarios (including 2007-2008). The water management plans acknowledge there are uncertainties in supply, and propose measures to address the uncertainties, such as conservation, drought management planning, emergency storage, and development of desalinization plants. This is an ongoing process.

In its second order, the court acknowledged that some information about projected future conditions of supply and demand was provided in appendix B of the Addendum, a 2008 "Memorandum Report on Olivenhain Municipal Water District Recycled Water System" prepared by a consultant, Keith Battle. It identified potential new users of recycled water, including local golf courses and a group of residential subdivisions. It went on to discuss uncertainties in supply, the existence of efforts to expand OMWD's system, and to estimate the potential future demand with reference to projected recycled water supply and demand. There was no need for further speculation about future demand.

Moreover, the Addendum also contained explanations of why different figures from the contract (230 AFY) and from the estimated actual usage (193 AFY) were used in estimating supply and demand. We disagree with plaintiffs that the Addendum analysis was inadequate, because it did not explain the arithmetic of water supply issues clearly enough. As observed by the trial court, the Addendum materials made clear that the project did not have to purchase all the water that it had contracted for, and that in fact, it anticipated using less. Although the contract was for a 60-year period, the operation of the landfill is estimated to be at 30 years.

Thus, the trial court was justified in rejecting the argument by plaintiffs that the Addendum should have more fully considered the projected impacts of supplying 230 AFY, as follows. "The fact that 230 AFY may be requested under the Agreement does not require Respondent to address the impact of providing 230 AFY, when Respondent estimates the maximum usage at 193 AFY. Respondent was required to -- and did -- address the maximum anticipated demand of water. Respondent was required to -- and did -- address the potential environmental impact if the anticipated maximum demand is reached. Respondent is not required to analyze levels of water usage Respondent does not intend to reach. [Plaintiffs] have failed to meet their burden of establishing that such an analysis is necessary."

2. Amounts Available to OMWD; Supplementation?

Next, in a closely related argument about the type of water supply that will be available in the future, plaintiffs contend the Addendum did not adequately discuss the use by OMWD of raw or untreated water for supplementation of its supply, in order to

produce adequate recycled water. In the report prepared by consultant Battle, he noted that OMWD ordinarily obtains certain amounts of untreated SDCWA water and uses it for supplementation. Although Battle compared recycled water supply and demand, by including the supplementation issue, plaintiffs believe his analysis was problematic because it was based on assumptions. Alternatively, they argue it contained new information that should have required supplemental environmental study. (§ 21092.1.)

In Battle's report, he identified potential new users of recycled water, including local golf courses and a group of residential subdivisions. Battle's estimate of potential water usage from these customers states that both supply and demand for recycled water will likely increase over the long term, and this can be dealt with through supplementation with untreated SDCWA water, as is currently being done. In his estimation, such supplementation would continue whether or not the project was receiving recycled water. When he compared OMWD's supply and demand information on an annual basis, he found there would be a deficit of 49 AFY if the full 193 AFY delivery to the project were included. However, he then explained that using such an annualized approach may be too restrictive, because many other factors may cause such annual estimates to fluctuate (e.g., seasonal demand, climatic conditions, and evaporation from storage facilities). Therefore, he concluded that the amounts of untreated SDCWA

water to be used by OMWD for supplementation would balance out, whether or not the project was receiving deliveries of recycled water.¹⁵

The trial court did not find any inconsistencies in the analysis, through the discussion of supplementation of anticipated OMWD production: "The RFEIR reflects that the OMWD currently supplements its supplies with SDCWA's raw water. Supplementation is identified as an included activity in OMWD's Master Reclamation Permit. Thus, OMWD will continue to supplement its recycled water supply with or without this Project. With the addition of reasonably foreseeable potential future uses and users, OMWD would have to increase the amount of untreated SDCWA water use by approximately 406-813 AFY without the Project. With the Project, supplementation would be between 599-1006 AFY. The Addendum acknowledges that it is not certain whether raw SDCWA water could be accessed to supplement either current or potential future recycled water demands. Efforts to counteract this uncertainty are discussed in the Addendum as required by *Vineyard*. . . ."

Plaintiffs have not convincingly shown how the trial court's conclusions that the Addendum was substantively proper were in error. Even assuming there were some conceptual problems with the Addendum's usage of an annualized analysis of supply and

¹⁵ Battle's technical findings discussed the anticipated increases in both supply and demand over the long term, stating: "While the percentage shortfall between recycled water demand and tertiary WRF effluent supply (including deliveries to GCLF) would increase, the percentage of the overall recycled water demand attributable to GCLF would be reduced somewhat. When projecting the percentage of supplementation by OMWD in the longer term, these figures tend to balance out such that deliveries to GCLF would not be expected to create a material increase in the percentage of supplementation required to meet OMWD's overall recycled water demands."

demand (among other methods), plaintiffs have not shown how those problems were not explained to the extent reasonably possible in the "uncertainty" analysis. The Agency responded adequately to the court's February 2008 ruling. Nor have plaintiffs shown that the Agency abused its discretion in proceeding to prepare the Addendum to the RFEIR. Their opposition to the motion to dissolve the writ was without merit on that ground.

V

BIOLOGICAL MITIGATION MEASURES

A. Issues Presented and Interpretative Standards

Plaintiffs argue that CEQA standards requiring the Agency to proceed in the manner required by law were not met, when Proposition C protections for "preservation of open-space for sensitive habitat" are correctly taken into account. (§ 21168.5.) Two main questions of law are presented: (1) interpretation of the October 2005 minute order and whether the RFEIR terms satisfactorily complied with its directions, and (2) interpretation of the language of Proposition C, requiring some "additional" mitigation measures, for the same purpose. The common issue is whether the Proposition C protections for "preservation of open-space for sensitive habitat" are identical and overlapping with the RFEIR's mitigation measures for the "creation or enhancement of habitat."

As instructed by *Vineyard, supra*, 40 Cal.4th at page 427, our review of the administrative record for such alleged legal error by the Agency is conducted de novo.

Next, plaintiffs focus on two additional contentions about whether the record contains substantial evidence in support of the Agency's determinations in the RFEIR.

(§ 21168.5.) Specifically, they question (3) whether the several types of biological mitigation measures impermissibly overlap or are illusory (vegetation, Southwestern arroyo toad habitat, and cumulative impacts), and (4) whether the amount of impacted acreage designated in the RFEIR as "suitable" Southwestern arroyo toad habitat, that was decreased from the "potential" amount originally estimated in the FEIR, was substantially supportable or represented an Agency abuse of discretion, for purposes of designing these mitigation measures.

Again as instructed by *Vineyard, supra*, 40 Cal.4th at page 427, our review of the administrative record for any substantial evidence in support of the Agency's challenged factual determinations, and its actions based upon them, is conducted de novo. We initially take note that our prior unpublished opinion addressed a different challenge to the FEIR's biological impacts mitigation measures, specifically, an argument that those mitigation measures were not sufficiently enforceable, with regard to the existence of a funding plan for them (i.e., whether the FEIR's mitigation measure 4.9-18, requiring management of the restored riparian area and the open space set aside under Proposition C, was illusory or not; we concluded it adequately provided for the necessary funding to carry it out).

In that connection, we noted in our prior unpublished opinion that the FEIR's biological mitigation measures included a habitat enhancement program (HEP) that would be managed by the project and would be a condition of the solid waste facility permit. The HEP obligated the project to work in cooperation with state and federal wildlife agencies to identify and implement long term management of the biological

resources. That sufficed for the enforceability of such mitigation measures, required as conditions of approving the project. The HEP has been updated and included in the RFEIR.

However, plaintiffs' current challenges to the biological mitigation measures deal with issues other than funding and enforceability, as we next explain.

B. Legal Issues: Special Proposition C Issues on Usage of Open Space Acreage for Mitigation Measures

In relevant part, the Agency's job in preparing the RFEIR was to ensure that feasible mitigation measures were identified, that would avoid or substantially lessen the significant environmental effects of the proposed project. (§ 21002; CEQA Guidelines, § 15126.4, subd. (a).) The RFEIR acknowledges the issuance of the October 2005 ruling, and sets forth revisions to address its criticisms (as will be described, *post*).

The October 2005 minute order set forth this interpretation to guide the Agency in revising the mitigation measures: "The plain language of Proposition C indicates that any open space offered as mitigation to adverse impacts resulting from the project must be included as *additional mitigation* to Proposition C's requirement that not less than 1,313 acres be dedicated as open space." (Italics added.) The October 2005 minute order found insufficient "several of the measures identified in the Final EIR to mitigate significant biological impacts of the Landfill project," because they "relied upon acreage already required to be preserved as open space under Proposition C."

As summarized by the trial court in the current matter, the October 2005 minute order "simply indicates that, to the extent Respondents were relying on the dedication of

open space as mitigation, they could not rely on the 1,313 acres already required by Proposition C to be dedicated as open space." However, the October 2005 minute order "did not state that additional actions that constitute mitigation -- i.e., habitat creation or enhancement -- could not take place on the 1,313 acres."

We are authorized to read the language of the initiative measure for its plain meaning. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) The Proposition C language relied upon, on its face, shows that the purpose of dedicating not less than 1,313 acres of open space, as part of the project, is "to create a substantial [or long term] preservation area for sensitive habitat and species." Upon subsequent environmental review of the project, any mitigation measures to be included are to be designated as "additional mitigation measures for the project."

Plaintiffs argue from that language that the revised mitigation measures remain inadequate as a matter of law, as duplicative of those Proposition C open space dedications. Specifically, plaintiffs would draw a distinction between separate mitigation measures to be required, beyond open space -- for vegetation communities, or cumulative impacts, or impacts on Southwestern arroyo toad habitat -- so that, in their view, additional off-site acreage must be purchased.

Plaintiffs thus claim the Agency should not have allowed the project to designate mitigation measures that would "create or enhance habitat," but that would take place within the open space already required by Proposition C. Some of that open space was already in a degraded condition, due to previous farming and dairy operations that took place on it. Plaintiffs reason from that fact that one of the purposes of Proposition C, to

preserve habitat, cannot be adequately served, unless further efforts are made, outside of the 1,313 acres of open space.

Those arguments were rejected by the trial court, in the following language:

"[N]either Proposition C, nor the Minute Order, suggests such an interpretation.

Proposition C requires 1,313 acres of open space to be set aside 'to create a substantial preservation area for sensitive habitat and species.' Contrary to Petitioners' argument, Proposition C does not state that if the 1,313 acres chosen for open space do not already provide a 'proper habitat,' those acres cannot be used to satisfy the open-space requirement. It does not state that habitat in those areas must be created or enhanced to assure compliance with Proposition C. Proposition C simply requires 1,313 of permanent open space to create a 'substantial preservation area for sensitive habitat and species.' It does not require Respondents to create or enhance the habitat in those 1,313 acres or suggest that particular areas of open space must be selected. *As Respondents point out, Proposition C requires 1,313 acres of open space, not 1,313 acres of habitat.* Because Respondents were not required by Proposition C itself to create or enhance the habitat in those 1,313 acres, they were permitted under Proposition C to create or enhance the habitat in those areas as part of their mitigation program." (Italics added.)

We agree with this well stated analysis of Proposition C language, and conclude that plaintiffs' legal challenges to the trial court's interpretation of it, in light of the previous order, are without merit.

C. Additional CEQA/FEIR Requirements: Substantial Evidence in Support of Utilization of Open Space Acreage for Mitigation Measures; Cumulative Issues

As a generalized CEQA argument, plaintiffs rely on CEQA Guidelines section 15126.4, subdivision (a)(1)(A) to say that mitigation measures must be identified for "each" significant environmental effect.¹⁶ They argue for separate treatment of vegetation acreage, cumulative acreage, and acreage for habitat of the Southwestern arroyo toad.¹⁷ In this respect, they point out that different numbers of acres have been used at various stages for the calculation of different kinds of mitigation measures. Previously, some 115 acres were identified in the FEIR as an estimate for providing mitigation opportunities. The original HEP identified 115.8 available mitigation acres,

¹⁶ CEQA Guidelines section 15126.4, subdivision (a)(1), Mitigation Measures in General, states in pertinent part that EIRs "shall describe feasible measures which could minimize significant adverse impacts [¶] (A) The discussion of mitigation measures shall distinguish between the measures which are proposed by project proponents to be included in the project and other measures proposed by the . . . agency or other persons which are not included but the lead agency determines could reasonably be expected to reduce adverse impacts if required as conditions of approving the project. This discussion shall identify mitigation measures *for each significant environmental effect* identified in the EIR. [¶] (B) Where several measures are available to mitigate an impact, *each* should be discussed and the basis for selecting a particular measure should be identified. . . . [¶] . . . [¶] (2) Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally-binding instruments. . . ." (Italics added.)

¹⁷ CEQA Guidelines section 15130 requires that the EIR's discussion of cumulative impacts shall reflect the severity of the impacts and their likelihood of occurrence, but the discussion need not provide as great detail as is provided for the effects attributable to the project alone. A reasonable analysis of the cumulative impacts of the relevant project is required, and an examination of reasonable, feasible options for mitigating or avoiding the project's contribution to any significant cumulative effects. (CEQA Guidelines, § 15130, subd. (b)(5).)

including the upland 88 acres that were formerly a dairy farm, that are degraded or trampled, and need work and plantings to be enhanced.

In the RFEIR, 212.6 acres were identified as the estimated on-site area for providing mitigation opportunities. URS, the biological consultants, arrived at this figure by conducting a supplemental analysis of impacts to vegetation communities, to update the FEIR maps and analyses, although mitigation ratios from the FEIR were preserved. They found that approximately 308.6 acres of vegetation impacts will occur from the project. The RFEIR estimates that 543.2 acres of mitigation is required to compensate for such project impacts to vegetation communities on-site, and this could be done in the form of either creation, enhancement, or preservation of habitat off-site, if required. That is, the RFEIR refers to this pending lawsuit and states that if its ultimate determination is that Proposition C does not allow any use of on-site habitat creation or enhancement for purposes of mitigation, then mitigation for the project could be accomplished through such a purchase of 543.2 acres of off-site vegetative habitat.

Alternatively, the consultants proposed that 407.8 off-site acres could be purchased, in combination with on-site mitigation measures for vegetation, for an identified 135.4 acres, which would be designated under the HEP for additional creation or enhancement of habitat, somewhere within the identified on-site 212.6 acres area (where such actions are feasible, i.e., outside of certain pipeline easements).

The RFEIR again refers to the ultimate outcome of this pending lawsuit, to provide that if off-site acquisition of additional vegetation habitat is ultimately required, such off-site acquisitions may occur either through direct purchase or through mitigation

credits from a habitat manager, mitigation bank, or environmental group, with conservation easements imposed. For example, the RFEIR anticipates that numerous off-site acres may be purchased for coastal sage scrub/chaparral areas, unless the on-site mitigation plans meet the designated acreage goals required by the RFEIR as a whole.

As discussed above, our conclusion is that Proposition C does not prohibit all on-site mitigation measures for "creation and enhancement" of habitat for vegetation, wildlife, and cumulative impacts, and they may be used in conjunction with any appropriate off-site measures.

At the hearing on the first motion to dissolve the writ, plaintiffs' counsel argued that it was unclear how the RFEIR's newly proposed 212.6 acre figure, to be utilized for on-site creation and enhancement of habitat, had been calculated by the biological experts. There are two different ways to arrive at the same estimate of 212.6 on-site acres to be used for biological mitigation measures. First, the on-site vegetation impact mitigation acreage identified in the RFEIR adds up to 148.5 acres (i.e., combining the enhanced 63.6 acres of coastal sage scrub, and 67.8 acres for live oak woodlands, plus 17.1 acres for restoring habitat frequented by the Least Bell's Vireo and the Southwest Flycatcher; the RFEIR recognizes that wildlife and vegetation habitats are interrelated).

Once this 148.5 vegetation mitigation on-site acreage is identified, it will apparently be implemented within the available on-site area of 212.6 acres, which is further broken down for vegetation purposes into 155.5 acres for "creation" of habitat, and 57.1 acres for "enhancement" of habitat.

With regard to proposed cumulative impact mitigation, the same figure of 212.6 acres is designated as available for biological mitigation measures. (Under the FEIR, mitigation measures for cumulative impacts were supposed to be "beyond" the vegetation mitigation.) Such cumulative mitigation will include the on-site "creation or enhancement" of habitat on 131.4 upland acres, and on 81.2 riparian acres. The question is, how is that different from the 155.5 vegetation "creation" acreage and the 57.1 vegetation "enhancement" acreage? (Both sets of numbers add up to 212.6, which is the available on-site area designated for biological mitigation.) Plaintiffs claim there is something strange about this 212.6 acre figure, because it can be arrived at two ways, regarding available acreage for both the noncumulative vegetation mitigation, and for the cumulative mitigation. Instead, plaintiffs argue for a different set of acreages to be set aside separately for each type of mitigation (i.e., 212.6 plus 212.6 plus 88 would equal 503.2 acres).

In its exhaustive ruling, the trial court identified the recent biological work completed by the consultant URS, in its updated biological technical report, as including "an evaluation of potential habitat creation and enhancement areas located on the landfill site," utilizing survey maps and fieldwork. The court noted: "These available areas for habitat creation or habitat enhancement are shown on Exhibit 4.9-6. These creation and enhancement areas on-site are consistent with historic vegetation communities that probably existed on-site prior to farming operations that occurred on the project site."

Consistently, the ruling notes that this biological technical report explains how URS identified the 212.6 acres of potential mitigation: "[B]ased on an inspection of the

areas, their soil, and their topography, [URS reported that] the areas were very likely historic vegetation communities prior to farming." As summarized by the trial court, from such research, the Agency could have rationally concluded that " '[t]he combination of soil type, topography, and availability of sunlight and water [currently on-site] are such that they could successfully sustain these vegetation communities.' " In other words, that information amounted to substantial evidence to support the Agency's conclusion that "212.6 acres for potential mitigation are available and that creation or enhancement of habitat would be consistent with historic vegetation communities that likely existed on the same site." (See *Association of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1391.)

In light of those portions of the record, plaintiffs have not explained why it is inappropriate to say in the RFEIR that within this particular topography and region, there are 212.6 available suitable acres for biological mitigation, and that different and overlapping activities and improvements may be conducted within them. Assume, as suggested by the proponents, that the project will create and enhance 63.6 acres of coastal sage scrub areas, and do the same for the live oak woodlands (67.8 acres). Then one adds 17.1 acres as creation and enhancement of habitat, through vegetation improvements, for the Least Bell's Vireo and the Southwest Flycatcher (to allow for interrelated wildlife and vegetation habitats). To achieve that total 148.5 acres, the mitigation activities will be conducted within the overall 212.6 acre on-site area, as appropriate.

Meanwhile, the RFEIR requires the proponents also to be "creating or enhancing" 131.4 upland acres and 81.2 riparian acres, for cumulative impacts. Some of this is

overlapping, and at least some of it amounts to "cumulative" mitigation that is "beyond" the vegetation mitigation, within the goals of the FEIR. Proposition C is not clearly violated by these mitigation measures, to add differing activities of creation and enhancement within the preserved open space, instead of just leaving it alone. The fact that some of that area is already in a degraded condition due to prior farming use can reasonably be interpreted to argue for, not against, the combination of related mitigation measures.

We conclude those revised mitigation measures are not inadequate as a matter of law, even in light of the original FEIR provisions describing the cumulative impacts mitigation as being "beyond the mitigation obligation" for vegetation. The creation or enhancement of habitat in the open space, in response to both vegetation and cumulative impacts, can reasonably be considered to comport with all the relevant limitations, and not to be overlapping or illusory.

Finally, the trial court drew a reasonable conclusion that the RFEIR adequately sets forth success criteria for ensuring proper mitigation through the creation or enhancement of habitat. The court pointed out that the previous FEIR's biological mitigation section was deemed adequate by the October 2005 minute order, with the exception of limited Proposition C issues. Therefore, "Petitioners fail to meet their burden of establishing that the RFEIR is deficient with respect to mitigation measures, particularly in light of the previous determination by the Court."

To the extent that new arguments have also been raised, plaintiffs have failed to show there is no substantial evidence in support of the Agency's determinations about the

appropriateness of the different types of the biological mitigation measures to be required.

D. Special Issues on Mitigation Measures Regarding Habitat for Southwestern Arroyo Toads (Substantial Evidence)

These arguments focus upon a revision in the RFEIR, that designated a smaller amount of acreage that would be potentially impacted as Southwestern arroyo toad habitat, i.e., 17.5 "suitable" impacted acres, in the immediate area of the river. This estimate was based in part on the HEP, as updated to 2007 in the RFEIR.

Previously, the original FEIR estimated that the "potential" impacted habitat for the Southwestern arroyo toad (the toad) amounted to 306 acres. In response to the new finding of 17.5 impacted "suitable" habitat acres for the toad, the RFEIR proposed to create and enhance 88 acres of on-site habitat, as mitigation measures. Those measures included sandy upland areas, to cover indirect effects of the project beyond the project footprint.

At the hearing on the first motion to dissolve the writ, plaintiffs' counsel argued that the RFEIR did not adequately consider both breeding and other types of impacted habitat utilized by the toads.¹⁸

¹⁸ Although plaintiffs continued to argue that the RFEIR had inadequately considered a different impact upon the toads' habitat (from the additional planned pumping of groundwater at the site), the trial court referred to the October 2005 minute order, which found the analysis of the impacts of groundwater pumping in the FEIR was sufficient. The court ruled that this groundwater claim had been adequately addressed and should not be relitigated at that point, and plaintiffs do not appear to pursue it on appeal.

In response to plaintiffs' objections, counsel for the Agency explained at the hearing that the previous designation of 306 acres of "potential" habitat was achieved through a generalized mapping for a two-kilometer (km.) region surrounding the river channel on the site. The reduced estimate of 17.5 acres of impacted "suitable" toad habitat was more recently calculated by biological experts (URS, a consultant for the project), based upon studies ranging from 1989 through 2005. The consultant gave the opinion that the toads were observed over a number of years as commonly traveling only a short distance from the stream or riverbed area, so the previous assumption that a two-km. habitat area around the riverbed was required was no longer justified.

In its ruling, the trial court cited to the record evidence on the issues argued by plaintiffs, which included the alleged inadequacy of the various studies utilized by the Agency and the experts who were consulted. Various toad surveys were conducted from 2000-2005, and updated in 2006. Plaintiffs now claim those studies were insufficient, that the criteria to establish the success of the planned mitigation measures were unclear, and that other experts had defined the impacted "suitable" toad habitat differently, based upon different soils data. They contend that the RFEIR provides inadequate mitigation for the impacted habitat.

In particular, plaintiffs contend the Agency used 40-year-old, out-of-date soils data, and not enough information had been included about the population size standards and ranges for the toads in the immediate areas, both riparian and upland. Plaintiffs rely on *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3d 348, 357 (*Cleary*), for the proposition that new or conflicting data or expert opinion may be used to show that an

agency may not have fully evaluated the project, and if so, the agency must supply good faith, reasoned analysis in response to such comments.

In defense of the RFEIR analysis, the Agency points to the biological technical report that explained how the suitable arroyo toad habitat was determined by the consultant URS, through soil surveys, field observations, and mapping. Although the previous estimates used a larger area around the riverbed, surveys from 1989-2005 concluded that arroyo toads are most likely distributed within a short distance of the river floodplain where appropriate soils are present, which excludes much of the 306 acres of "potential" upland habitat as an area that is actually used by toads, either actively or casually. The consultant took the HEP into account and gave the opinion that the planned 88 acres of upland habitat on-site, to be enhanced with vegetation, would be adequate to mitigate these impacts upon the toads within their "suitable" habitat area (variously estimated to be from 10.5 acres through 17.5 acres or 32 acres). This 88 acres of work would occur in addition to riparian habitat mitigation at a nearby bridge, and could take place within the 134.5 acres of upland habitat also planned for the vegetation communities.

In the RFEIR responses by the Agency to comments by the experts relied on by plaintiffs, the Agency distinguished those experts' methodologies and sources, and explained why the Agency was using different data and study methods, as outlined above. The earlier toad studies had been updated, from 2000 to 2005. They showed that out of the 306 acres previously identified as "potential" upland habitat, the FEIR had also found only 32 acres of that to be "suitable" upland habitat. The consultant URS restudied

those 32 acres, including soil type, toad surveys, and field observations, and concluded it was reasonable to base mitigation requirements on "suitable" upland habitat that was impacted, because "it was not appropriate to require mitigation where the connection to actual use by toads is tenuous." Its recommendations therefore included the proposed mitigation area of 88 acres of upland toad habitat to be created on-site, which should support toad populations in excess of the numbers that may occasionally use impacted areas, outside of the identified 17.5 acres of suitable habitat.

In responses to comments, the Agency acknowledged there were letters from the U.S. Fish and Wildlife Service that suggested potential alternative survey methods and other considerations. However, the Agency concluded that the studies conducted from 2000, 2003, 2005 and 2006 provided sufficient information to adequately assess impacts from the project upon this type of habitat.

In light of these responses to comments and the analysis in the RFEIR, there does not appear to be any particularly persuasive support for continuing to utilize the previous designation of 306 acres of "potential" impacted habitat, since it had apparently been designated by a more or less generic mapping of the two-km. area surrounding the river channel on the site. More recent and specific information was available, and the Agency relied on evidence and expert analysis in response to various comments about the impacted toad habitat issues, in accordance with the requirements of *Cleary, supra*, 118 Cal.App.3d 348, 357.

As previously explained, in challenges under CEQA, courts are not required to resolve conflicts between expert opinions. (*Laurel Heights I, supra*, 47 Cal.3d at p. 393;

Cadiz, supra, 83 Cal.App.4th at pp. 101-102.) Plaintiffs' arguments have not demonstrated that substantial evidence is lacking for the mitigation analyses set forth in the RFEIR.

DISPOSITION

The orders are affirmed. The Respondents are awarded costs on appeal.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

AARON, J.